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United States Department of Agriculture,

OFFICE OF THE SECRETARY.

BOARD OF FOOD AND DRUG INSPECTION.

REGULATIONS AND DECISIONS CONCERNING GUARANTIES AND SERIAL NUMBERS, AND THEIR USE.

A Compilation including section 9 of the Food and Drugs Act; Regulation 9 (Form of Guaranty); Food Inspection Decision 40 (Filing Guaranty); F. I. D. 62 (Guaranty on Imported Products); F. I. D. 70 (Abuse of Guaranty for Advertising Purposes); F. I. D. 72 (Use of Guaranties and Serial Numbers Thereof); F. I. D. 83 (The Use of a Guaranty Based upon a Former Guaranty), and F. I. D. 96 (Serial Number Guaranty).

Food and Drugs Act, Section 9.

SEC. 9. No dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

Regulation 9. Form of Guaranty.

(Section 9.)

(a) No dealer in food or drug products will be liable to prosecution if he can establish that the goods were sold under a guaranty by the wholesaler, manufacturer, jobber, dealer, or other party residing in the United States from whom purchased.

(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number,

which number shall appear on each and every package of goods sold under such guaranty with the words, "Guaranteed under the food and drugs act, June 30, 1906."

(c) The following form of guaranty is suggested:

I (we) the undersigned do hereby guarantee that the articles of foods or drugs manufactured, packed, distributed, or sold by me (us) [specifying the same as fully as possible] are not adulterated or misbranded within the meaning of the food and drugs act, June 30, 1906.

(Signed in ink.)

[Name and place of business of wholesaler, dealer, manufacturer, jobber, or other party.]

(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.

F. I. D. 40. Filing Guaranty.

In order that both the Department and the manufacturer may be protected against fraud it is requested that all guaranties of a general character filed with the Secretary of Agriculture in harmony with Regulation 9, Rules and Regulations for the Enforcement of the Food and Drugs Act, June 30, 1906, be acknowledged before a notary or other official authorized to affix a seal. Attention is called to the fact that when a general guaranty has been thus filed every package of articles of food and drugs put up under the guaranty should bear the legend, "Guaranteed under the Food and Drugs Act, June 30, 1906," and also the serial number assigned thereto, if the dealer is to receive the protection contemplated by the guaranty. No other word should go upon this legend or accompany it in any way. Particular attention is called to the fact that nothing should be placed upon the label, or in any printed matter accompanying it, indicating that the guaranty is made by the Department of Agriculture. The appearance of the serial number with the phrase above mentioned upon a label does not exempt it from inspection nor its guarantor from prosecution in case the article in question be found in any way to violate the food and drugs act of June 30, 1906.

Approved:

JAMES WILSON, *Secretary of Agriculture.*

WASHINGTON, D. C., *October 25, 1906.*

F. I. D. 62. Guaranty on Imported Products.

Many inquiries of the following type have been received by the Department:

We will take it as a favor if you will advise us if (since our goods are all imported and so must pass the custom-house before being sold) the fact of their having passed the customs authorities and the Department of Agriculture examination is not in itself a guaranty that they conform with the pure-food laws as defined by the act of Congress approved June 30, 1906, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, liquors," etc.

The Department makes a systematic inspection of imported foods and drugs when they arrive at the custom-houses; and while such inspection does not include an examination of samples taken from every package of the aforesaid articles, it is sufficient to indicate that the article is suitable to enter the country and be sent into interstate commerce as long as it retains its identity in the unbroken package. If imported foods and drugs are taken from the original packages and repacked, they become subject to inspection as if of domestic origin, and the persons handling and selling said articles are not immune from prosecution in the event that a subsequent inspection discloses that all or any portion of said foods or drugs are adulterated or misbranded according to the provisions of said statute or the regulations made thereunder.

Only a wholesaler, jobber, manufacturer, or other party residing in the United States can give a guaranty within the meaning of said act. A foreign manufacturer or other foreign dealer can not give the guaranty prescribed in said law, nor can the agent of such foreign manufacturer or dealer give said guaranty unless such agent be a resident of the United States and unless he actually sells the goods covered by the guaranty.

The person who owns and sells imported goods can make a guaranty for the purpose aforesaid, though the goods may be shipped directly by the firm of whom the guarantor buys them to the customer of the guarantor.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *March 25, 1907.*

F. I. D. 70. Abuse of Guaranty for Advertising Purposes.

The attention of the Department has been called repeatedly of late to the abuse, for advertising purposes, of the serial number assigned to a guaranty. The Department of Agriculture accepts no responsibility for the guaranty which the manufacturer or dealer files. Particular attention must be paid to the fact that it must neither be directly stated nor implied in any fashion that the Department of Agriculture nor the United States Government guarantees or indorses the products to which the guaranty and serial number are attached. *The guaranty represented by the serial number is the guaranty of the manufacturer and not of the Government.*

To facilitate business a serial number is assigned to this guaranty, and the guaranty is filed in the Department of Agriculture for the purpose of verifying the serial number when it is used on packages of goods.

The misuse of the serial number is a misrepresentation, and in each case of such an abuse the serial number will be withdrawn and the guaranty returned after proper notice. Serial numbers, however, which have been issued and passed into commerce prior to withdrawal will be respected by the Department in any action which may be brought against dealers selling goods bearing the number which is improperly used.

The attachment of the serial number or guaranty to articles which are not foods or drugs is also regarded as a misrepresentation on which a similar action will be based.

H. W. WILEY,
FREDERICK L. DUNLAP,
GEO. P. McCABE,

Board of Food and Drug Inspection.

Approved:

JAMES WILSON, *Secretary of Agriculture.*

WASHINGTON, D. C., *May 14, 1907.*

F. I. D. 72. Use of Guaranties and Serial Numbers Thereof.

A misapprehension exists as to the requirements of the regulations for the enforcement of the food and drugs act, June 30, 1906, in regard to placing the serial number on articles manufactured by persons who have filed a guaranty with the Department and to whom a serial number has been issued identifying the said guaranty. Many have the impression that if a guaranty be filed the serial number which is assigned thereto must be used on all foods or drugs manufactured by them.

Regulation 9 provides two general methods of guaranty. The first is described in subdivision (b) of Regulation 9, as follows:

(b) A general guaranty may be filed with the Secretary of Agriculture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words, "Guaranteed under the food and drugs act, June 30, 1906."

The second is described in subdivision (d) of Regulation 9, as follows:

(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.

The statement in subdivision (b), that when a guarantor is assigned a serial number the said number *shall* appear, should not be construed as mandatory. The meaning is that if a manufacturer wishes to make effective the guaranty filed with the Department, he must place the legend and serial number on his goods, otherwise no protection is afforded to his customers in the absence of a special agreement or the alternative as provided in subdivision (d) of Regulation 9.

Regulation 9, in its entirety, is intended to provide for the enforcement and administration of section 9 of the food and drugs act, which reads as follows:

SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

A study of the law in connection with the regulations makes it apparent that the intention is to provide a means whereby the manufacturer can assume responsibility under the law for the character of the goods manufactured by him, after they have passed out of his possession into the hands of the persons who purchased them from him. In no case is a guaranty a good defense, unless it be from the person who sold the goods to the person offering the guaranty as a defense. In order to simplify the procedure, the Department volunteers to act as custodian of the guaranty, which is an offer on the part of the manufacturer to free dealers, reselling his goods, from responsibility, under the law, for possible misbranding or adulteration. In order that the guarantor may convey this intention on his part to purchasers of his goods, a serial number is assigned to such guarantor, and by placing this number on his goods he fixes his responsibility. Whether he desires to enter into an agreement of this kind with the purchaser of his goods is a matter wholly within his discretion, and he can use the serial num-

ber or not for this purpose, as he may please. The use of the number will save the trouble of individual guaranties with each individual transaction or each individual customer. In other words, the label itself will carry notice that the manufacturer holds himself responsible, under the law, to the persons who purchase goods directly from him, for any misbranding or adulteration.

H. W. WILEY,
FREDERICK L. DUNLAP,
GEO. P. MCCABE,

Board of Food and Drug Inspection.

Approved:

JAMES WILSON, *Secretary of Agriculture.*

WASHINGTON, D. C., May 17, 1907.

F. I. D. 83. The Issue of a Guaranty Based upon a Former Guaranty.

Food Inspection Decision 83, giving the opinion of the Attorney-General on certain phases of the use of the guaranty under Section 9 of the food and drugs act, June 30, 1906, is promulgated by the Department of Agriculture for the guidance of those who have occasion to make use of such guaranties during the carrying on of their ordinary business relations.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., November 22, 1907.

Opinion of the Attorney-General.

NOVEMBER 11, 1907.

The Honorable The Secretary of Agriculture:

SIR: I have the honor to acknowledge the receipt of your letter of September 10, in which you request my opinion upon a question which has arisen in your Department in the administration of the food and drugs act of June 30, 1906, in a class of cases of which the following is a type:

An examination having been made in the Bureau of Chemistry, in accordance with section 4 of the act, of a sample of food purchased from a retail dealer in the District of Columbia, and the food having been found to be adulterated, the dealer was cited for a hearing, and, having appeared, established as a defense under which he claimed protection a written guaranty, conforming to the requirements of section 9 of the act, from a Maryland wholesaler who had sold him the food and shipped it to him in the District of Columbia in the exact condition in which he sold it here.

The Maryland wholesaler, having been then cited, in turn appeared and established a similar guaranty, under which he also claimed protection, from a Pennsylvania manufacturer who had sold him the food and had shipped it to him in Maryland in the exact condition in which he had, in turn, guaranteed it and shipped it to the retailer in the District of Columbia.

The question upon which my opinion is requested is whether, upon such state of facts, the Maryland wholesaler is amenable to prosecution for violation of the act or is protected by the guaranty from the Pennsylvania manufacturer.

By section 2 of the food and drugs act (34 Stat., 768) it is made a misdemeanor, *inter alia*, to ship any adulterated or misbranded food or drugs in interstate commerce, or to receive the same in such commerce, and, having so received, to deliver the same to any other person in original, unbroken packages, or to sell the same in the District of Columbia.

Section 9 of the act further provides:

That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

After careful consideration of this act, together with the memoranda prepared by the members of the Board of Food and Drug Inspection, which you have submitted with your letter, I am of the opinion that the guaranty from the Pennsylvania manufacturer affords complete protection to the Maryland wholesaler and that he is hence not amenable to prosecution under the act on account either of the interstate sale and shipment made by him to the retailer in the District of Columbia or of the guaranty given by him in connection therewith.

1. It is clear that the Maryland wholesaler is protected from prosecution for the interstate sale and shipment made by him, by the explicit provision of section 9, that "no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of the act."

The broad term "dealer" which is used in this section, not being restricted in its meaning by any other provision of the act, includes those who deal at wholesale as well those who deal at retail. I am of the opinion, therefore, that under the plain language of this provision any dealer, whether a wholesaler or retailer, who would otherwise be

amenable to prosecution for dealing in an adulterated or misbranded article in violation of the act, is protected from prosecution on such account by establishing a guaranty in conformity with the requirements of the act, signed by a resident of the United States from whom he purchased such article.

2. A more difficult question, however, arises in reference to the liability of the Maryland wholesaler to prosecution by reason of the guaranty which he gave the District of Columbia retailer in connection with the sale and shipment to him.

It is expressly provided by section 9 of the act that wherever a dealer who would otherwise be subject to prosecution establishes a guaranty from a resident of the United States who sold him the articles, the dealer is thereby protected, and such guarantor "shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act." Construing this section in its entirety, I am of the opinion that its purpose was to create, in addition to the offense of manufacturing and dealing in adulterated and misbranded food and drugs specifically made misdemeanors by sections 1 and 2 of the act, the distinct and substantive offense of guaranteeing, under the food and drugs act, any adulterated or misbranded article—thereby enabling the purchaser to deal with such articles in a manner otherwise forbidden without being amenable to the punishment to which he would otherwise be subject—the offense of giving such false guaranty, however, not to be complete until the purchaser deals with the article thus guaranteed in a manner otherwise punishable by the act, in which event the guarantor would become subject to the same punishment for giving the false guaranty as that to which the purchaser would otherwise be amenable by reason of his dealing with the article.

Without discussing the scope and effect of this provision, I am of the opinion that whatever this may be, the maker of a false guaranty is just as much protected from any prosecution to which he might be liable on this account by establishing a former guaranty from the person from whom he purchased the article as he is thereby protected from prosecution for dealing with the article in a manner otherwise forbidden by the act; in other words, that the former guaranty is a complete protection against any prosecution under this act.

It is true that section 9 does not specifically state that the first guaranty shall protect the second guarantor, but this result follows from the broad provision that "no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the * * * party * * * from whom he purchases such articles." As a prosecution for the false guaranty would be a prosecution "under the provisions" of the act, and as the dealer's protection under his vendor's guaranty is not limited by the act to prosecutions for dealing in the articles, but includes all prosecutions under its provisions, a

former guaranty would in my opinion afford a dealer protection against the punishment to which he might otherwise be amenable for his own false guaranty as well as for selling or shipping the article in violation of the act.

In short, the intention of Congress appears to have been to relieve from liability any person who would otherwise be subject to any prosecution under the act if he establishes a guaranty from the person who sold him the goods, provided such person is a resident of the United States, and therefore himself within the reach of prosecution, and to make such original guarantor subject to prosecution in lieu of the subsequent offender, Congress evidently intending to refer back liability in such case, in general, to the original guarantor, who, of course, in the case of goods of domestic production, would usually be the manufacturer, who would know their real character, and, in the case of goods imported from a foreign country, would be the importer, who would assume responsibility therefor, and to make the liability to punishment fall upon such original guarantor so far as possible.

It further appears from the report of the House Committee on Interstate and Foreign Commerce, which reported the food and drugs bill for passage in substantially the form in which it was afterwards enacted, and which, under the doctrine of *Holy Trinity Church v. United States* (143 U. S., 457, 464) and *United States v. Binns* (194 U. S., 486, 495), may be properly looked to for the purpose of throwing light upon the intent of Congress, that the provision in question was inserted in the bill by the committee and that its general purpose was to protect persons dealing in the articles subsequent to the manufacturer or importing agent and direct the penalty to the original guarantor as far as possible. The committee in its report said:

As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard, before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecution; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the act will be directed to the original guarantor.

These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty. (Ho. Rep. 2118, 59th Cong., 1st sess., p. 3.)

And again:

The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers. (Ho. Rep. 2118, *supra*, p. 9.)

Section 8 of the bill which was thus inserted by the committee read as follows:

That no dealer shall be convicted under the provisions of this act when he is able to prove a guaranty of conformity with the provisions of this act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: *Provided*, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this act. (Ho. Rep. 2118, *supra*, p. 11.)

It will be seen that the provision thus inserted and commented upon by the committee is substantially the same, so far as the present question is concerned, as section 9 of the bill as afterwards enacted, and it is made clear by this report that it was the intent of the committee, at least, in inserting this provision to entirely relieve from prosecution any retail or wholesale dealer who had received a guaranty from the person from whom he purchased, and, as stated by the committee, to "prevent any dealer from being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty."

Any other construction of this act would work great hardship upon an innocent intermediary who, relying upon the guaranty which he receives from the original manufacturer of an article, sells it in interstate trade and guarantees it in his turn. And if the original guaranty does not fully protect him in such case, it would become exceedingly hazardous to sell and guarantee such article, even though guaranteed by the manufacturer, without first making, on his own account, a detailed investigation, chemical or otherwise, to ascertain whether it is in fact adulterated or misbranded. Manifestly, however, such a requirement would in many cases seriously impede and obstruct interstate trade.

It is stated in Doctor Dunlap's memorandum that, from the conditions that the Board of Food and Drug Inspection has found to exist throughout the whole business community, dealers engaged in interstate trade are insisting on a guaranty from the seller and purchasing only under such guaranty; that in order to do an interstate business to-day a dealer must give a guaranty with the goods he sells, whether

he be the actual manufacturer or not; and that if the dealer can not rely upon the manufacturer's guaranty as a protection, it must have the effect of preventing interstate sales on the part of small concerns, and even of large concerns who probably would not care to incur the added expense and trouble, in many cases prohibitive, of having the goods carefully analyzed in order to be fully acquainted with their character.

There is, however, a presumption against a construction of a statute which "would cause grave public injury or even inconvenience" (*Bird v. United States*, 187 U. S., 118, 124). And it was said by Lord Coke, in language which was quoted by Abbott, C. J., in *Margate Pier Co. v. Hannam* (3 B and Ald., 266, 270), and cited with approval in *Holy Trinity Church v. United States* (143 U. S., 457, 459), that: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

The construction which I have given the act is furthermore supported by the view expressed in Greeley's food and drugs act, sec. 65, p. 4, that:

A wholesaler or jobber who purchases food or drug products from the producer or from anyone else may safely guarantee the goods so purchased to his consumers, provided he has from the producer or other person from whom he purchased the goods a guaranty covering them.

For these reasons, I am of the opinion that in the case stated the Maryland wholesaler is not amenable to prosecution under the act, but is completely protected by his guaranty from the Pennsylvania manufacturer.

3. I should add, however, that the fact that both the District of Columbia retailer and the Maryland wholesaler are protected from prosecution by the guaranties which they have established from their respective vendors, does not, in my opinion, exempt the adulterated food from confiscation under section 10 of the act, which provides, *inter alia*, that *any* adulterated or misbranded food or drug which is being transported in interstate commerce for sale, or, having been transported, remains unloaded, unsold, or in original, unbroken packages, or is sold or offered for sale in the District of Columbia, may be proceeded against in the district where found "and seized for confiscation by a process of libel for condemnation." The provision of section 9 that no dealer shall be prosecuted when he establishes a guaranty from his vendor merely affords protection, in my opinion, against the criminal prosecution, fines, and other penalties to which the dealer would otherwise be personally amenable, and does not in any way affect the liability of the merchandise to confiscation under the provisions of section 10.

Respectfully,

CHARLES J. BONAPARTE,
Attorney-General.

F. I. D. 96. Serial Number Guaranty.

As a result of the numerous requests for specific information on various points connected with the filing of general guaranties with the Department, as well as on the use of serial numbers after they have been assigned, the following general instructions bearing on these questions are issued for the guidance of those interested:

(A) For information regarding the serial number guaranty, see Rules and Regulations for the Enforcement of the Food and Drugs Act (Circular 21), Regulation 9, and Food Inspection Decisions 40, 70, 72, and 83.

(B) Articles to be guaranteed may be referred to in the guaranty in the following ways:

1. By name.
2. By use of general terms. For example, proprietary medicines, extracts, carbonated waters, etc., using the proper terms to cover the line or lines sold.
3. By stating in the space reserved for listing articles "all articles which are now or which may hereafter be manufactured, packed, distributed or sold by" in which case the serial number can be used on all foods or drugs, subject to the act, manufactured or owned and sold by the guarantor.

(C) The formulæ of preparations are not required to be given.

(D) The serial number guaranty should not be used on articles not entitled to bear such a guaranty: For example,

- (1) Those of a character which are not included in the definition of articles within the purview of the act as given in section 6 found on page 17 of Circular 21.
- (2) Those subject to the meat inspection law, i. e., meat and meat food products of domestic origin or manufacture derived from cattle, swine, sheep, and goats. (Imported meat and meat food products are subject to the food and drugs act and may be guaranteed by means of a serial number or guaranty.)
- (3) Those used in the arts and for technical purposes.

(E) A serial number assigned to a guaranty can be used on any article covered therein to which the act applies. (See B.)

(F) Products not covered by the guaranty on file at the Department can be added thereto by executing another guaranty covering them to be filed as a supplement to the original instrument. (See B.)

(G) The serial number guaranty can be printed either directly on the principal label or appear on a supplemental label or paster attached to the goods.

(H) Only a resident of the United States can make a valid guaranty. (See Food Inspection Decision 62.)

(I) The general guaranty filed with the Department must be executed by the person, company, association, or corporation who assumes responsibility for the goods, or by his or its agent thereunto lawfully authorized, and the authority of such agent must plainly be made to appear when the guaranty is offered to be filed.

(J) Full information relative to the signing of the guaranty instrument appears at the bottom of the blank form of guaranty.

(K) The signature should be acknowledged before a notary public or other official authorized to administer an oath. The seal of such official should always be affixed to the document.

H. W. WILEY,
FREDERICK L. DUNLAP,
GEO. P. MCCABE,

Board of Food and Drug Inspection.

Approved:

JAMES WILSON, *Secretary of Agriculture.*

WASHINGTON, D. C., *May 20, 1908.*

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